

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

YOUNG BROTHERS, LTD

Employer

and

Case 20-RC-176883

WORKING FOREMEN'S AND
WORKING SUPERVISORS' UNION, LOCAL 100,
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.¹

¹ In concluding that Barge Terminal Superintendent Holland's removal of an employee from the workplace did not constitute a disciplinary action, we do not give weight to the fact that the incident took place at the end of the shift. We also find that the single instance of the use of a report form completed by a Barge Terminal Superintendent to support subsequent discipline, cited by the Employer and our dissenting colleague, is insufficient to show that those forms routinely play a consistent and specific role in the Employer's progressive discipline system. See *Veolia Transportation*, 363 NLRB No. 98, slip op. at 7-10 (2016). We likewise reject the assertion that Barge Terminal Superintendents' ability to delay lunch breaks confers supervisory status; as the Regional Director found, the decision to delay is dictated by the pace of the work and nature of the cargo.

We further reject the Employer's and our dissenting colleague's argument that the Barge Terminal Superintendents are statutory supervisors because they are the highest-ranking employees on site when they perform port relief and on Saturdays. See *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. 2-3 (2015) and *WSI Savannah River Site*, 363 NLRB No. 113, slip op. 2-3 (2016). As the Regional Director recognized, highest rank is a secondary indicium of supervisory status which does not confer 2(11) status where, as here, the putative supervisors are not shown to possess any of the primary indicia of supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 10 (2006). Our dissenting colleague reiterates a position rejected by the Board in *Buchanan Marine, L.P.*, 363 NLRB No. 52, slip op. at 2, which we decline to revisit.

Unlike the Board majority here, Acting Chairman Miscimarra would grant review on the basis that the RD's decision and direction of election raise substantial issues regarding the question of whether the Barge Terminal Superintendents (BTSs) are supervisors in relation to their authority to discipline, assign, responsibly direct, adjust grievances, promote or effectively recommend such actions within the meaning of Sec. 2(11) of the Act. Acting Chairman Miscimarra believes the record appears especially compelling as to the potential authority to

PHILIP A. MISCIMARRA, ACTING CHAIRMAN

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., March 8, 2017.

assign, responsibly direct and discipline, which are supported, for example, by evidence that (1) when BTSs are performing port relief, they are the only management personnel on the island; (2) a BTS sent an employee home early without pay after the employee was in a verbal altercation with another employee; (3) disciplinary report forms filled out by BTSs are kept in employee files and are used to support disciplinary action; and (4) BTSs may decide to work through required employee meal breaks despite the Employer having to pay a penalty. This case also strongly resembles *Matson Terminals, Inc.*, 20-RC-173297 (October 7, 2016) (Member Miscimarra, dissenting), where then-Member Miscimarra would have granted review based on substantial questions regarding the Sec. 2(11) status of supervisors and senior supervisors who likewise were responsible for overseeing cargo loading and unloading. Moreover, Acting Chairman Miscimarra notes that, in this case, the petitioned-for unit encompasses 10 BTSs, 9 of whom oversee 63 subordinate employees who do cargo loading and unloading in Honolulu, and 1 of whom oversees 31 subordinate employees who do cargo loading and unloading in Maui. If the Board finds that the BTSs are not supervisors, this would mean that a single Operations Manager (Martin) has supervisor authority over 72 cargo loading/unloading employees in Honolulu, in addition to Operations Manager Martin's responsibilities for overseeing loading/unloading employees in another location (Lanai). It would also mean that a different Operations Manager (Cruz), including a port manager, have supervisor authority over 32 cargo loading/unloading employees in Maui, in addition to Operations Manager Cruz's similar responsibilities for overseeing loading/unloading employees in three other locations (Hawaii, Molokai and Kauai). In these circumstances, Acting Chairman Miscimarra believes it is implausible to believe that two Operations Managers (and a Vice President to whom they report) and a port manager would exercise all supervisory authority over 104 cargo loading/unloading employees at two distant locations, especially given that this would mean that no supervisors were even present during much of the time when complex loading and unloading operations were being performed. See *Buchannan Marine, L.P.*, supra, slip op. at 10 (Member Miscimarra, dissenting) (stating that, when applying the supervisor criteria set forth in Sec. 2(11), the Board should consider (i) the nature of employer's operations; (ii) the work performed by undisputed statutory employees; and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute).

Finally, Acting Chairman Miscimarra also believes substantial questions exist regarding whether uncontroverted evidence of supervisory authority was discounted or disregarded "merely because it could have been stronger, more detailed, or supported by more specific examples," id., slip op. at 9 (Member Miscimarra, dissenting), or because the disputed supervisors' involvement in discipline did not entail automatic discipline. See *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 12-14 (2016) (Member Miscimarra, dissenting); Sec. 2(11) (stating that individuals are supervisors if they have authority to "discipline other employees . . . or effectively to recommend such action" (emphasis added)).